

On appeal, the respondent contends claimant failed to prove, that after his October 23, 1994, accident, his back injury worsened and this caused him to voluntarily terminate

his employment on May 15, 1995. Furthermore, respondent contends claimant failed to prove his work-related back injury temporarily and totally disabled him from work. Additionally, respondent argues claimant failed to prove his back injury resulted in any permanent functional impairment. Also, respondent argues, if the Appeals Board finds claimant proved he suffered a work-related permanent functional impairment, claimant was able to continue working performing his regular job duties after the October 23, 1994, accident, and voluntarily terminated his employment with respondent on May 15, 1995, for reasons not associated with his back injury. Thus, respondent argues claimant retained the ability to earn the same wage he earned before the work-related injury. Accordingly, respondent contends claimant is not entitled to a work disability but is limited to permanent partial disability benefits based on his functional impairment rating.<sup>1</sup>

Respondent, in its brief, also questions the Administrative Law Judge's average weekly wage finding of \$564.56 based on the wage statement and fringe benefits costs admitted into evidence at the regular hearing. Respondent argues claimant's correct average weekly wage computes to \$553.10 instead of \$564.56.

In contrast, the claimant contends the Administrative Law Judge's Award should be affirmed as to claimant's entitlement to temporary total disability benefits and the amount of his average weekly wage. But claimant argues the more persuasive evidence contained in the record proves he is entitled to a 70.5 percent work disability instead of the Administrative Law Judge's finding of a 53 percent work disability.

In summary, the issues on appeal are:

1. What is claimant's average weekly wage?
2. What is the claimant's date of accident?
3. What is the nature and extent of claimant's disability?
4. Was claimant temporarily and totally disabled from work from July 7, 1995, through July 21, 1995, as a result of permanent injuries suffered while employed by the respondent?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

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<sup>1</sup>See K.S.A. 44-510e(a).

**1. *What is claimant's average weekly wage?***

Based on the wage and fringe benefit statements admitted into evidence at the regular hearing, the Administrative Law Judge adopted claimant's proposed average weekly wage of \$564.56. But respondent contends claimant's average weekly wage computes to \$553.10 instead of \$564.56. The difference is the \$11.46 per week that claimant included in his average weekly wage computation for the employer's cost of vacation and holiday pay. The respondent contends vacation and holiday pay are not "additional compensation" as defined in the statute.<sup>2</sup>

The Appeals Board agrees with the respondent and concludes the employer's cost of vacation and holiday pay are not "additional compensation", as defined in the statute and should not be included in the computation of the average weekly wage.<sup>3</sup>

But the Appeals Board also finds the weekly employer's cost of vacation and holiday pay, for the period contained in the record, totals \$1,645.09 per year which equals \$31.64 per week instead of the \$11.46 per week as computed by the respondent. Thus, the Appeals Board concludes claimant's average weekly wage as found by the Administrative Law Judge in amount of \$564.56 should be reduced by \$31.64, the employer's weekly cost of vacation and holiday pay, producing an average weekly wage of \$532.92.

**2. *What is claimant's date of accident?***

The Administrative Law Judge found claimant suffered a work-related accident on October 23, 1994, and then a series of accidents as he performed his regular work duties through his last day worked of May 15, 1995. The Administrative Law Judge concluded claimant left his employment with respondent because he could no longer continue to work as a result of the unreasonable pain caused by his back injury. According to the Administrative Law Judge, claimant's testimony coupled with the testimony of orthopedic surgeon Edward J. Prostic, M.D., supported this conclusion.

The Appeals Board agrees with the Administrative Law Judge and concludes that claimant's appropriate date of accident is May 15, 1995, the last day claimant worked before he terminated his employment with respondent because of his work-related back injury.<sup>4</sup>

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<sup>2</sup>See K.S.A. 44-511(a)(2).

<sup>3</sup>See Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 374-376, 947 P.2d 440 (1997).

<sup>4</sup>See Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

### ***3. What is the nature and extent of claimant's disability?***

The Appeals Board affirms the Administrative Law Judge's findings, based on Dr. Prostic's examination of claimant, that claimant sustained a 12 percent permanent functional impairment of the body as a whole and a 50 percent task loss as a result of his work-related back injury. Dr. Prostic based his functional impairment rating opinion on the AMA Guides, Third Edition (Revised).

Although Dr. Prostic did not examine claimant until September 26, 1997, he had, at the time of the examination, the benefit of claimant's previous medical treatment records which included MRI examinations of claimant's thoracic and cervical spine. The record also contains two other physician's opinions on claimant's functional impairment rating. But both of those opinions were based on the AMA Guides, Fourth Edition instead of the Third Edition (Revised) as required by statute for a May 15, 1995, date of accident.<sup>5</sup> The Appeals Board, therefore, finds neither of those physician's opinions can be considered in determining claimant's impairment of function.

Respondent argues the claimant failed to prove his work-related back injury caused claimant to suffer any permanent functional impairment. Respondent contends Dr. Prostic's permanent functional impairment opinion is inadmissible because the claimant failed to include in the evidentiary record a copy of the relevant portion of the AMA Guides, Third Edition (Revised) that Dr. Prostic utilized in arriving at his functional impairment opinion. Respondent cites the Durham<sup>6</sup> case for the authority in support of this argument.

The Appeals Board finds, however, the Durham case can be distinguished from the facts of this case because the claimant in Durham, for the first time on appeal, attempted to raise the issue of whether the physician properly used the AMA Guides in arriving at his opinion. Because the claimant in Durham was questioning a specific portion of the AMA Guides, he attempted to place into evidence a copy of that portion of the AMA Guides by attaching a copy to his appeal brief. The Court of Appeals in Durham simply made an evidentiary ruling and found the AMA Guides could not be admitted as part of the record for the first time before the Court of Appeals.

Here, Dr. Prostic testified his functional impairment opinion was based on the AMA Guides, Third Edition (Revised) as required by statute. The Appeals Board does not interpret Durham to require the admission of a copy of the AMA Guides into the record every time a party is attempting to question the physician's use of the AMA Guides in arriving at his opinion. Furthermore, in this case, Dr. Prostic was not questioned on how he specifically utilized the AMA Guides in arriving at his rating. Therefore, the Appeals Board finds it was not necessary for a copy of the AMA Guides to be included in the

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<sup>5</sup>See K.S.A. 44-510e(a).

<sup>6</sup>Durham v. Cessna Aircraft Co., 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

evidentiary record in order to establish a proper foundation for Dr. Prostic's functional impairment opinion.

Further, the Appeals Board concludes the Administrative Law Judge's finding that claimant is entitled to work disability should be affirmed. Claimant established through his testimony that he terminated his employment with the respondent as a result of his work-related back injury. After the termination, claimant was able to find other employment, but the wages he earned at these other employment opportunities did not equal 90 percent or more of his pre-injury average weekly wage. Thus, claimant is entitled to a work disability, if it is greater than his functional impairment.<sup>7</sup>

Claimant first went to work for Precision Metals in Grove, Oklahoma, on May 16, 1995, and worked through August 25, 1995, earning \$260 per week. Accordingly, claimant's work disability for that period was 50.5 percent.<sup>8</sup>

After claimant left Precision Metals, he established, although he did not find appropriate employment, he made a good faith effort to find employment for the period from August 26, 1995, through April 30, 1996.<sup>9</sup> Accordingly, claimant's work disability for that period was 75 percent.<sup>10</sup>

On or about May 1, 1996, claimant found part-time employment working at Pawhuska Oklahoma Police Department earning minimum wage of \$5.15 per hour. Accordingly, claimant's work disability for that period was 55.5 percent.<sup>11</sup>

At the time of the regular hearing, claimant had been employed as the head jailer by the Osage County, Oklahoma, Sheriff's Department since August 1996. Claimant was earning \$1,100 per month or \$253.85 per week. Accordingly, claimant's work disability at that time was 51 percent.<sup>12</sup>

#### ***4. Was claimant temporarily and totally disabled from work***

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<sup>7</sup>See K.S.A. 44-510e(a).

<sup>8</sup>Wage loss of 51% (\$532.92 average weekly wage compared to claimant's actual earnings of \$260 per week) averaged with a 50% work task loss.

<sup>9</sup>See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>10</sup>Because claimant was not earning a wage and he made a good faith effort to find employment, he had a wage loss of 100% averaged with a 50% work task loss.

<sup>11</sup>Wage loss of 61% (\$532.92 average weekly wage compared to claimant's actual earnings of \$206 per week, found by taking \$5.15 per hour times 40 hours because claimant did not have any restrictions to limit him to working 40 hours per week) averaged with a 50% work task loss.

<sup>12</sup>Wage loss of 52% (\$532.92 average weekly wage compared to claimant's actual earning of \$253.85 per week) averaged with a 50% work task loss.

***from July 7, 1995, through July 21, 1995, as a result of permanent injuries suffered while employed by respondent?***

The Administrative Law Judge found claimant was temporarily and totally disabled from work as a result of his work-related back injury from July 7, 1995, through July 21, 1995. Respondent contends claimant failed to prove his work-related back injury rendered him completely and temporarily incapable of working from July 7, 1995, through July 21, 1995. Respondent argues claimant had successfully performed his regular job duties for the respondent from his initial date of accident, October 23, 1994, until he voluntarily quit his employment on May 15, 1995.

After this initial October 23, 1994, accident, claimant was taken off work for only six days and placed on light duty for nine days before he was released to regular duty on November 14, 1995. After claimant terminated his employment on May 15, 1995, the work he performed for Precision Metals was mainly sedentary and if he had to lift heavy items, he lifted the items with a hoist. Furthermore, claimant's own testimony established he had no complaints while performing his work duties at Precision Metals until approximately June 29, 1995, when he exacerbated his back injury while raking gravel at his parent's house.

Claimant's family physician, Charles J. Chouteau, M.D., was the physician who took claimant off work for the period in question. Dr. Chouteau testified he took claimant off work because claimant's back symptoms had worsen and claimant, in his opinion, was not capable of performing any type of work, even the sedentary work at Precision Metals. But Dr. Chouteau's medical records do not reflect that claimant had exacerbated his low-back condition while raking gravel for his parents. Claimant testified, after this temporary exacerbation, his back condition returned to the base line condition he had at the time he terminated his employment with the respondent. The Appeals Board, therefore, concludes the reason claimant was taken off work by Dr. Chouteau was related to the temporary exacerbation of claimant's back injury that occurred while claimant was raking gravel for his parents and not the direct result of the back injury claimant suffered while working for respondent.

Additionally, the Appeals Board adopts the Administrative Law Judge findings and conclusions of law contained in the Award as it's own that are not inconsistent with the findings and conclusions set forth in this Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' Award entered on December 23, 1998, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Peter J. Wood, and against the respondent, Aptus, and its insurance carrier, Reliance Insurance Company, for an accidental injury which occurred on May 15, 1995, and based upon an average weekly wage of \$532.92.

Claimant is entitled to 14.57 weeks of permanent partial benefits at the rate of \$319 per week or \$4,647.83 for a 50.5% permanent partial general disability, followed by 35.57 weeks of permanent partial disability benefits at the rate of \$319 per week or \$11,346.83 for a 75% permanent partial general disability, followed by 13.14 weeks of permanent partial disability benefits at the rate of \$319 per week or \$4,191.66 for a 55.5% permanent partial general disability, followed by 148.37 weeks of permanent partial disability benefits at the rate of \$319 per week or \$47,330.03 for a 51% permanent partial general disability, making a total award of \$67,516.35 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

The Appeals Board approves and adopts all remaining orders set forth in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Pittsburg, KS  
Allan E. Coon, Olathe, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director